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LOWENBACH'S ADM'R et al. v. KELLEY.

Nov. 17, 1910.

[69 S. E. 352.]

1. Estoppel (§ 68*)—Position in Litigation.—A creditor recovered a judgment against his debtor, and later obtained a default order on scire facias to review the judgment, and issued another execution. The administrator of the creditor sued to subject to the judgment lands alleged to have been conveyed by the debtor to his wife in fraud of creditors, in which suit the trustee in bankruptcy of the creditor intervened claiming to own the judgment on which the action was founded. Held, that he could not thereafter complain at being made a party to a motion by the debtor to quash the second execution on the validity of which his right to sustain his creditor's suit depended.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 165-169; Dec. Dig. § 68.* 5 Va.-W. Va. Enc. Dig. 282.]

2. Execution (§ 163*)—Motion to Quash—Time.—A motion to quash a fi. fa. based upon a sci. fa. which revived a judgment, but which was made returnable six months after its date, and was, therefore, void, being in direct conflict with section 3220 of the Code of 1904, providing that all process, etc., shall be returnable within 90 days, will not be barred because of laches, where no prejudice has resulted to the judgment creditor from the delay, the statute of limitations having run when the fi. fa. was issued.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 476; Dec. Dig. § 163.* 5 Va.-W. Va. Enc. Dig. 444; 8 Va.-W. Va. Enc. Dig. 600.]

3. Execution (§ 163*)—Motion to Quash—Nature of Remedy.—The motion to quash is a substitute for the common-law writ of audita querela, and is governed by the same rules of limitation.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 476; Dec. Dig. § 163.* 5 Va.-W. Va. Enc. Dig. 444; 8 Va.-W. Va. Enc. Dig. 180.]

4. Execution (§ 163*)—Motion to Quash—Limitations.—The writ of audita querela, although a personal action, is not governed by the statute of limitation in regard to personal actions unless specially named; therefore, a motion to quash which follows the same rules as an audita querela is not void, by relation to the five-year limitation in personal actions.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 476; Dec. Dig. § 163.* 2 Va.-W. Va. Enc. Dig. 180.]

5. Execution (§ 163*)—Motion to Quash—Time for Making.—A motion to quash a fi. fa. will lie though it is not alive, for the exe-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series, & Rep'r Indexes.

cution creditor might as soon as it was issued direct the sheriff to return it without knowledge of the execution debtor, thus depriving the debtor of any chance to object.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 476; Dec. Dig. § 163.* 5 Va. W. Va. Enc. Dig. 444.]

Error to Circuit Court, Rockingham County.

Action by Lowenbach's administrator and others against John E. Kelley. From a judgment for the defendant, plaintiff brings error. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.